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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO RIVERA, JR.,

Defendant and Appellant.

D059390

(Super. Ct. No. RIF117841)

APPEAL from a judgment of the Superior Court of Riverside County, Christian F. Thierbach, Judge. Affirmed.

A jury convicted Alberto Rivera, Jr. of the second degree murder of Jose Alfonso Diaz (Pen. Code,¹ § 187, subd. (a), count one); the lesser offense of attempted voluntary manslaughter of Arthur Mendoza (§§ 664, 192, subd. (a), count two); and discharging a firearm at an occupied vehicle (§ 246, count three). The jury found true allegations that in committing counts one and three, Rivera personally and intentionally discharged a

¹ All statutory references are to the Penal Code unless otherwise stated.

firearm and proximately caused great bodily injury or death to another person who was not an accomplice (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8)), and in committing count two, he personally used a firearm (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8)).

The court sentenced Rivera to 44 years four months to life in state prison as follows: 15 years to life for murder, plus 25 years to life for the count one firearm enhancement, plus four years four months on count two and its enhancement.

Rivera contends the trial court (1) abused its discretion and violated his constitutional right to due process by denying his motion for a continuance to prepare a new trial motion; (2) violated his right to counsel and *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) when it denied his request to discharge retained counsel and obtain court-appointed counsel to prepare a new trial motion; and (3) erroneously ruled that any new trial motion alleging juror misconduct would fail for lack of prejudice. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Rivera does not challenge the sufficiency of the evidence to support his conviction; therefore, we briefly summarize the facts to provide context for the court's rulings on the motion for a continuance and the *Marsden* motion.

Arthur Mendoza testified that on July 4, 2004, he was driving a Honda vehicle with his brother, Jose Alfonso Diaz, in the passenger seat. While stopped at an intersection, a truck pulled up next to them, and Mendoza saw the driver shoot at his car. Mendoza was injured, and at the time of trial still had a bullet lodged in his arm. Diaz

died of a gunshot wound that perforated his aorta and lungs. The day of the incident, Mendoza identified Rivera as the shooter in a lineup.

Jose Luis Valenzuela testified he was stopped in his car at the same intersection that day when he saw a Honda car stopped on his right. A truck pulled up to the right of the Honda, and the truck driver fired about four or five shots at the Honda.

DISCUSSION

I.

A.

No Abuse of Discretion in Denying the Motion for a Continuance

The jury convicted Rivera on June 9, 2010, and the court scheduled sentencing for September 10, 2010. The judge met with the parties briefly on the scheduled day and requested a postponement of sentencing. The court noted Rivera had moved to represent himself under *Faretta California* (1975) 422 US 806 (*Faretta*). It set October 15, 2010, for a motion hearing and sentencing.

On October 15, 2010, defense counsel requested a continuance to further investigate possible jury misconduct and a new trial motion. The court stated its misgivings about further delay, telling defense counsel: "[I]t seems to me that four-plus months would be sufficient time to do whatever investigation needed to be done." Nonetheless, the court granted a continuance until November 10, 2010, saying, "I would think you'd be close enough, based on the conversations you've already had with these jurors, to be prepared to argue the motion for new trial." Rivera withdrew his *Faretta* motion at that hearing.

At the November 10, 2010 hearing, defense counsel sought a four-week continuance to complete the investigation regarding jury misconduct. He informed the court regarding the investigator's interviews with jurors conducted on November 8, 2010: a juror reported that at least one other juror had visited the crime scene; one juror had conducted Internet research regarding the consequences of jury deadlock; and one juror told others who favored manslaughter that for that conviction Rivera might receive a minimal five-year prison term. Finally, the jury foreman had said during deliberations, "If you possess a gun, it means you have the intent to kill"; but when a juror suggested that the foreman ask the judge about the foreman's legal interpretation, the foreman declined to do so. Defense counsel acknowledged some of the jurors' statements to the investigator possibly encroached on their thought processes. Defense counsel did not provide the court with juror affidavits regarding the claimed misconduct.

The court challenged defense counsel's timeline for completing the investigation in four weeks: "If I were to accept everything you're arguing and grant the request for a four-week continuance and assume, hypothetically, that these two or three jurors provide the information that you want them to provide or you think they would provide, then you're gonna come in here four weeks from now and request another continuance so you can comply with the provisions of the Code of Civil Procedure to have the identities of all the jurors given to you, and then both sides can go out and conduct an investigation, and we will be back here, probably, in February or maybe even March by the time that is completed. [¶] So I don't think it's accurate to say that four weeks from now we can get this resolved." Defense counsel conceded the point: "I agree with the court. I don't

mean to minimize that in the sense that everything will be resolved in four weeks. . . .
[¶] . . . [T]hat gives us enough time to have the jurors fill out affidavits."

The court denied the continuance for three reasons: (1) the defense had failed to comply with the notice requirements of section 1050, particularly because, as the court noted, "the defense and the [p]rosecution apparently were aware of potential misconduct issues right after the verdict was announced. Why further efforts were not made to dig deeper into this, I don't know. . . . And I think to delay this case for any more time is a classic case of justice delayed justice denied"; (2) the judge, acting as the 13th juror, found credible Valenzuela's percipient witness testimony that Rivera shot at the victims' car; and (3) the judge assumed for purposes of argument that jury misconduct had occurred, but reasoned it had not harmed Rivera because he was convicted of second degree murder, although the judge believed the evidence showed "about as slam-dunk a case of first-degree murder as you can get." The judge added, "I was here. I got to see [the witnesses] testify. And the testimony that we heard absolutely supports the verdicts that were announced. And, more importantly, I asked each and every one of these jurors individually if the verdicts that they rendered represented their individual verdicts. And without hesitation, all 12 of them said, 'Yes.' "

" 'Continuances shall be granted only upon a showing of good cause,' " and the moving party must show that the evidence could be obtained within a reasonable time. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

"In determining whether a denial [of a continuance] was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons

presented for the request. [Citations.] One factor to consider is whether a continuance would be useful." (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013.) The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

Here, the court did not abuse its discretion in denying Rivera's November 10, 2010 request for a continuance. Five months had passed since June 9, 2010, when the jury reached its verdict and the parties first learned of possible juror misconduct. Further, the defense had received two time extensions but failed to timely investigate the claims, despite the court's warning when it granted the October continuance that the misconduct investigation already should have been completed. Moreover, defense counsel conceded that the four-week continuance would suffice only to terminate the investigation and obtain the jurors' affidavits. The defense likely would have required more time to prepare a new trial motion. The record shows the court carefully analyzed the reasons advanced for a continuance, and we conclude it did not abuse its discretion in ruling that the defense had failed to show good cause for the continuance, or that the defense could complete the new trial motion within a reasonable time.

B.

During the hearing on the *Marsden* motion, Rivera told the court he believed juror misconduct had occurred. The court responded, "[Y]ou heard me say that I'm operating on the theory or the assumption there was juror misconduct. I recognize that. But in my ruling, I also said that that misconduct, if in fact it existed, was not to the extent it denied

you a fair trial. [¶] So the issue of whether there's juror misconduct or not is really moot. I am telling you there was." Based on that statement, Rivera claims the trial court erroneously denied his new trial motion.

We conclude that despite Rivera's contention the trial court had ruled on a new trial motion, it did not. Rivera's counsel had merely moved for a continuance, and Rivera never in fact filed a new trial motion. The burden is on Rivera to demonstrate error from the record; error will not be presumed. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.)

II.

Marsden Motion was Properly Denied

Rivera brought a second *Faretta* motion on grounds he intended to move for a new trial in part because his trial counsel "did not call percipient witnesses. Nor did he conduct reasonable investigation of them." The court treated the request as a *Faretta* motion before denying it. However, at the hearing, the court also denied Rivera's oral request for representation by counsel, which is properly treated as a *Marsden* motion. On appeal, Rivera does not challenge the denial of his *Faretta* motion, therefore we deem any such claims as forfeited. Rather, Rivera appeals the denial of his *Marsden* motion, contending the court acted summarily and thus "violated [his] Sixth Amendment right to the effective assistance of counsel when it denied his motion to relieve retained counsel and obtain court-appointed counsel."

In addressing Rivera's second *Faretta* motion, the court asked Rivera, "You want to represent yourself?" He replied, "I would like a—I would actually like, umm, counsel

appointed to me, if that is possible." Rivera said his retained counsel had been ineffective. When the court asked him to clarify why he could do a better job than his attorneys, Rivera said, "Because obviously it wouldn't make sense for my own attorneys to make issues on ineffective counsel. And, obviously, I have some concerns. And the only way I can bring them to you, Your Honor, is by through [*sic*] a [new trial] motion." Rivera stated that defense counsel had not interviewed some of his proposed witnesses. Rivera continued somewhat incoherently: "Just some strategic and tactical decisions. I mean, I know those are mostly privileges in the higher courts, but I'm just—I just feel that I should do a mistrial [*sic*] motion. We have always had that differences after our verdict. Of course, like you said, [Defense counsel] is—a highly respected attorney." Rivera added, "[Defense counsel] saved my life. . . . I just, I feel I want to do a mistrial [*sic*] motion, and the only way is for me either to get a counsel appointed to me or—[.]" The court interrupted him and said, "It's not gonna happen, Mr. Rivera."

The court denied the *Marsden* motion because no evidence showed Rivera's trial counsel had provided ineffective assistance. The court stated, "I believe that you're motivated by a desire to delay this process, unnecessarily so. And it is further my opinion . . . that you have absolutely no chance in the world of bettering your situation here. You've been convicted of various crimes. . . . The evidence, in my opinion, was overwhelming to support a first-degree murder conviction, along with a true finding on the special circumstance. The jury disagreed. The jury came back with a lesser [offense]. [¶] So nothing can be gained by allowing you to delay this process even further in what I believe is a fruitless effort to try to overturn the jury's verdict."

"When a defendant seeks discharge of his appointed counsel on the basis of inadequate representation by making what is commonly referred to as a *Marsden* motion, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel's inadequacy." (*People v. Cole* (2004) 33 Cal.4th 1158, 1190.) "It is the very nature of a *Marsden* motion, at *whatever* stage it is made, that the trial court must determine whether counsel has been providing competent representation. Whenever the motion is made, the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*. But the decision must always be based on what has happened in the *past*." (*People v. Smith* (1993) 6 Cal.4th 684, 694-695, quoted in *People v. Sanchez* (2011) 53 Cal.4th 80, 88.) The court's exercise of discretion in ruling on the *Marsden* motion will not be disturbed on appeal, unless it is shown by the defendant that his right to assistance of counsel was "substantially impaired" by the continued representation of counsel. (*People v. Lindsey* (1978) 84 Cal.App.3d 851, 859.)

Here, the court satisfied its duty to fully consider Rivera's complaints about counsel. The sole specific instance of ineffective assistance that Rivera adduced in the trial court was that his attorney had failed to interview some witnesses. However, whatever tactical difference existed between Rivera and his trial counsel regarding which witnesses to investigate or call to testify, that decision was ultimately the attorney's to make. No evidence shows that their tactical differences lead to a breakdown in the attorney-client relationship. To the contrary, Rivera highly praised defense counsel, recognizing he had "saved [Rivera's] life" by defeating the charges filed and instead

limiting his conviction on two counts to lesser included offenses. "A disagreement regarding trial tactics does not require the substitution of appointed counsel, unless the disagreement 'signal[s] a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel.' " (*People v. Lindsey, supra*, 84 Cal.App.3d at p. 859.) "The transcript clearly indicates that the trial judge made inquiry of defendant and listened to his complaints. Nothing more was required under *Marsden*." (*People v. Williamson* (1985) 172 Cal.App.3d 737, 745.) On this record, we are satisfied that the court fulfilled its duty of inquiry.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.